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MILITARY GOVERNMENT IN THE SOUTH DURING RECONSTRUCTION.

BY the acts of March 2 and March 23, 1867, Congress laid down the lines on which the process of reconstruction was finally to be carried through. This legislation, supported by the public sentiment of the North, practically settled the constitutional issues of the war. Not that efforts were not made to break the hold of the national military power on the South. Sanguine lawyers of both sections hastened to Washington to invoke the aid of the supreme court in overthrowing what seemed palpably unconstitutional proceedings under the Reconstruction Acts. Mississippi applied through counsel for an injunction to restrain the president from enforcing those acts,[1] but in vain; "government by injunction" in this particular aspect failed to win the favor of the court. Nor was any better success attained when Georgia moved against Stanton, the subordinate,[2] rather than Johnson, the chief. The court wisely recognized a sphere in which it would not intrude upon the discretion of the executive. A more promising opportunity to test the obnoxious laws arose in connection with the writ of *habeas corpus*. For the better enforcement of the Civil Rights Act Congress in 1867 extended the appellate jurisdiction of the supreme court to all *habeas corpus* cases that involved United States laws. One McCardle, a Mississippi editor, availed himself of this law to bring before the court the question as to

[1] Miss. *vs.* Johnson, 4 Wall. 475. [2] Georgia *vs.* Stanton, 6 Wall. 51.

the legality of his arrest under the Reconstruction Acts. The supporters of these acts were very distrustful of the court, especially as to its possible opinion on the clauses establishing military government. When, therefore, the court denied a motion to dismiss McCardle's appeal and heard the case argued on its merits, the Congressional leaders were greatly alarmed. Before an opinion was rendered the House hurried through a repeal of so much of the act of 1867 as was involved in McCardle's case; the Senate concurred with unwonted celerity; and, though the scheme was detected in time to receive the president's veto, the bill became a law, and the court dismissed the case for want of jurisdiction.[1] The justices were no doubt greatly relieved to escape the responsibility of deciding this case. It was much better from every point of view that the fierce controversy of the times should be fought out entirely by the distinctively political organs of the government. After the failure of the McCardle case the opposition to reconstruction found significant expression chiefly in the messages of the president and the platforms of the Democratic Party, neither of which carried much weight.

Meanwhile the process was carried to its conclusion by the military commanders to whom its execution was entrusted. The functions of these officers were, under the terms of the acts, of a twofold character. First, the "adequate protection to life and property," which was declared by the acts to be lacking, was to be furnished by the military; second, the organization of a new political people in each of ten[2] states was to be effected according to the method laid down in the acts. The purpose of this essay is to set forth the leading features of the military régime in the performance of the first of these functions.

I.

The chief end of the Reconstruction Acts was purely political. They were enacted for the purpose of giving the negro

[1] *Ex parte* McCardle, 6 Wall. 324; 7 Wall. 512.

[2] Tennessee had been restored to her normal relations in the summer of 1866.

the ballot in the ten Southern states which had rejected the proposed Fourteenth Amendment. Their whole operation, therefore, must be regarded as incidental to this object. That the establishment of military government was a feature of the system they embodied, was due primarily to the fact that the introduction of negro suffrage was possible only by the strong hand. The act of March 2 did indeed allege that "no adequate protection for life or property" existed in the states concerned, and asserted the necessity of enforcing peace and good order therein. But these declarations were inseparably connected with the denunciation of the existing state governments as illegal; so that the lack of protection for life and property could be construed as arising from the illegality rather than from the inefficiency of the *de facto* civil authorities.

It was, indeed, contended by the more violent radicals in the debates on reconstruction that the actual conditions in the South were intolerable and that military force was needed for the mere maintenance of peace, apart from political reorganization. But the weight of evidence pointed to the contrary. The reports of the army commanders and of the commissioners of the Freedmen's Bureau for 1866 were almost uniformly of a reassuring tone. Abuse of freedmen and Union men was not only becoming less common, but was also receiving adequate attention from the ordinary state courts. General Wood declared that in Mississippi substantial justice was administered by the local judiciary to all persons irrespective of color or political opinions. General Sickles thought the same to be true for most parts of South Carolina. General Howard, the head of the Freedmen's Bureau, drew from the reports of his subordinates a similar conclusion as to the whole region covered by their operations.[1] On the other hand, General Sheridan found a good deal still to be desired in Louisiana and Texas, and Sickles admitted that certain specified counties of South Carolina failed to afford a safe habitation for the freedmen. The latter officer's explanation of the existing disorder embodied a truth that was applicable very generally throughout the South. He declared

[1] See reports annexed to that of the Secretary of War for 1866.

that the outrages in the localities referred to were not peculiar to that time.

> Personal encounters, assaults and difficulties between citizens, often resulting in serious wounds and death, have for years occurred without serious notice or action of the civil authorities; . . . where it has hitherto seemed officious to arrest and punish citizens for assault upon each other, they can hardly be expected to yield with any grace to arrests for assaults and outrages upon negroes.[1]

The general here touched upon a potent source of evil to the South in the days of reconstruction. Northern opinion tended to judge the rebel states by social standards that never had been fairly applicable to them. A laxity in the administration of criminal justice that had always prevailed was wrongly ascribed by the North to a mere *post-bellum* spirit of rebellion and race hatred.

The most striking evidence that affairs were assuming a normal condition in the South was afforded by the extent to which military authority and jurisdiction were withdrawn during the year 1866. The Freedmen's Bureau had been endowed with judicial authority in cases in which the freedmen were not assured of equal rights with the whites; but by the end of that year a gradual relinquishment of this authority was completed in most of the states. Only in parts of Virginia, Louisiana and Texas were the special courts still in existence at the time of the commissioner's report. The ordinary administration of civil and criminal justice for all citizens irrespective of race had thus been resigned to the state courts. This process had of course been rendered much more rapid by the enactment of the Civil Rights Act, which gave to the regular national judiciary jurisdiction over cases in which equal rights were denied. By action of the military authorities the "vagrancy laws" and other offensive statutes passed by the state legislatures for controlling the blacks had been rendered nugatory, and the United States courts manifested from the outset a resolution to give to the Civil Rights Act an interpretation that should effectively nullify any parts of the "black codes"

[1] Report annexed to Annual Report of the Secretary of War for 1866.

that had escaped the military power. But all further labor by the judiciary on the problem of securing equal civil rights for the freedman was rendered for the time unnecessary by the resort to military power to secure him equal political rights.

In the spring of 1867, when the first Reconstruction Act went into effect, the general situation in the South was probably not as satisfactory as it had been at the beginning of the preceding winter. Two causes had contributed to a reaction. In the first place, the crops had in many parts of the South failed entirely in 1866. The pressure of famine began to be felt early in the winter, and by the beginning of the next spring the distribution of food through both public and private agencies had assumed large proportions.[1] Upon the relations between the races the crop failure had serious effects. Complaints arose in every direction from the freedmen that their wages were not being paid by their employers. The latter in too many cases were quite unable to pay, in others were disposed to take advantage of the situation to escape their liability. Much friction naturally arose out of the circumstances. To this was added the bad feeling generated by the discussion of negro suffrage in Congress and out during the winter. As the resolution of the dominant party to enfranchise the blacks by force became clear, the disgust and despair of the whites tended toward expression in violence, especially wherever the freedmen manifested any consciousness of unwonted power. There is little room to doubt that the establishment of military government at the South was indispensable to the Congressional scheme of reconstruction; but that such government was necessary without reference to that scheme is hardly to be conceded.

II.

By the act of March 2, 1867, the ten Southern states affected were divided into five military districts, each to be

[1] By authority of a joint resolution of March 30, the Freedmen's Bureau devoted half a million dollars to the purchase and distribution of food in the South. — Report of Commissioner Howard.

commanded by an officer not below the rank of brigadier-general. The duties of these officers were

> to protect all persons in their rights of person and property, to suppress insurrection, disorder and violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals.

For the execution of these duties the commanders could either allow the local civil tribunals to try offenders or organize military tribunals for the purpose. In case the latter method were employed, the sentence of the tribunal was to be subject to approval by the district commander; and, if it involved the death penalty, to the approval of the president. Interference with the military under color of state authority was declared null and void, while the existing civil governments in the states were declared provisional only, and subject to the paramount authority of the United States, to abolish, modify, control or supersede. In these provisions were defined the functions of the commanders so far as the preservation of order and the conduct of civil administration were concerned. Their duties in the reorganization of the state governments were set forth in the supplementary act of March 23d, and will be considered elsewhere.

On the 11th and 15th of March orders from army headquarters made the following assignments of commanders: first district, Virginia, General Schofield; second district, North Carolina and South Carolina, General Sickles; third district, Georgia, Florida and Alabama, General Pope; fourth district, Mississippi and Arkansas, General Ord; fifth district, Louisiana and Texas, General Sheridan. All these officers had distinguished themselves in the war and had acquired reputations that guaranteed success in any military capacity. But the positions in which they now found themselves demanded other than purely military qualities. They were to carry out a great political policy, which was to be resisted not by armed force, but by political means. They were to act under a commander-in-chief who was a violent adversary of the policy, and under a general of the army whose conscientious efforts to

maintain an impartial attitude failed to conceal his disposition to favor the policy. They had to deal, moreover, with civil governments which their commander-in-chief insisted were constitutional organizations, but which Congress had declared destitute of legality. Though military officers are not supposed to have political opinions, the five generals could hardly fail to be influenced by their personal conclusions on the great issues of the day. It was generally known that Sheridan and Pope were in favor of strong measures in dealing with the South, and that Sickles would readily adopt a radical line of action.[1] If Schofield and Ord, from whatever motives, failed to conform to this example, it was inevitable that they should be displeasing to the extremists in Congress and should be sustained by the moderate Republicans and the Democrats. Political, rather than military, considerations would necessarily form the basis for judgment upon the conduct of the commanders; and in order to sustain their honorable reputations a degree of tact and discretion in civil affairs was essential that far exceeded anything that had been required of them before.

As to the mass of the whites — the people, in a political sense, of the South — no possible conduct of the military rulers could be expected to win their approval. The necessity of submission to force had been thoroughly learned, and no organized resistance was attempted to the few thousand troops that were scattered over the ten states.[2] But the loss of the self-government which had gradually been restored during the last two years caused deep indignation and resentment. Apart from the dread of approaching negro domination, the mere consciousness that the center of authority was at military headquarters, and not at the state capital, disheartened the most moderate and progressive classes. It soon appeared, more-

[1] *Cf.* Blaine, Twenty Years of Congress, II, 297, note. This note, though satisfactory for the subject in connection with which I have cited it, contains a number of those inaccuracies of statement and implication which mar every part of this useful but untrustworthy work.

[2] The Adjutant-General's Report of October 20, 1867, gives the total force in the ten states as 19,320, distributed among 134 posts. Richmond and New Orleans had about 1000 men each; but at no other post were there as many as 500. Of the total force, over 7000 were in the fifth district — Louisiana and Texas.

over, that military government was not to be simply nominal; the orders of the commanders reached the commonest concerns of every-day life, and created an impression of a very real tyranny.

At the outset all five generals announced a purpose, and most of them a desire, to interfere as little as possible with the ordinary civil administration.[1] Officials of the existing governments were directed to continue in the performance of their duties until duly superseded. All elections under state laws were forbidden, however, since the negroes were to be clothed with the suffrage before the popular will should again be consulted. As to the administration of justice, whenever it appeared to the military officers that the ordinary courts were not sufficiently active or impartial in their work, cases were transferred to the military tribunals that were expressly authorized by the Reconstruction Act. The punishment of blacks by whipping or maiming, which was provided for by recent state acts, was prohibited at once, in accordance with a rider in the army appropriation act of March 2, 1867. It was inevitable that the summary overriding of the established order, on however moderate a scale, should engender conflicts of authority and consequent friction; but the only result was that the assertion of military control in the administration of both civil and criminal law increased steadily in scope in all the districts as the months rolled on. Each fresh recourse to arbitrary authority aroused a great storm of reproach and denunciation from the Democratic press both North and South; and in June the administration itself, through a published opinion of Attorney-General Stanbery, harshly disapproved the policy adopted by most of the officers. This brought a crisis; and Congress, hastily reassembling, conclusively defined the scope of the military power by the supplementary legislation of July 19.

[1] The most important orders and correspondence relating to military government in its initial and determining stages are embodied in Sen. Ex. Doc. No. 14, 1st sess., 40th Cong.

III.

The most harassing question that had to be dealt with by the generals on assuming their commands was that of their relation to the officers of the existing state governments. The act of March 2 declared these governments to be provisional only and subject to the paramount authority of the United States "to abolish, modify, control or supersede the same"; but did not expressly empower the district commanders to wield this paramount authority. In pursuance of their express power to maintain order, the generals were, however, obliged to assume that a control over the *personnel* of the state administration was implied. Removals from office were, accordingly, made from the beginning on grounds of inefficiency or of obstruction to the work of registering the negroes. As removals did not abolish the offices, but were followed by appointments, military headquarters tended to become the center of a keen struggle for place and patronage. The mutual recriminations of the parties to such struggles were echoed throughout the land and contributed one more element to the embarrassment of the commanders.

The manner of filling vacancies caused by removal or otherwise also gave rise to serious discussion. Under military law there seemed no doubt that an officer or soldier could be detailed by the commander to perform the duties of any position. This method was employed in many cases; but in this respect the supply of troops was entirely inadequate to the demand, and resort had to be made to civilians. At this point, however, important questions of constitutional law arose. What was the legal status of a civilian appointed, for example, governor of Louisiana? Was he a state or a federal officer? Certainly not the former; for, apart from the question as to whether any state in the constitutional sense existed in Louisiana, no officer of such a state could be conceived as deriving his tenure from the will of an army officer. But if the appointee were a federal officer, why should he not be subject to the constitutional requirement of appointment by the president, with the advice and

consent of the Senate? Congress might, under the constitution, vest the appointment of inferior officers in "the president alone, in the courts of law or in the heads of departments";[1] but there seemed no basis for appointment by a major-general commanding a military district. As a matter of fact, the attempt to define the precise status of civilian appointees was never successful. The radicals in Congress thought they should be designated rather as "agents" of the district commanders than as officers in any strict sense.[2] It was rather gratifying than otherwise to reflect that these "agents" drew their salaries, not from the army appropriation or any other national funds, but from the treasury of the state.

Serious as were the questions involved in the policy, the commanders were forced by sheer necessity to make civilian appointments from the very outset. In this practice the whole spirit of the reconstruction legislation required that only "loyal" men receive preferment. Thus was begun, even before reconstruction was effected, the process of giving political position and power to a class which, from the nature of the case, could have little influence with the masses of the Southern whites. In the beginning the test of "loyalty" was a record of opposition to secession and of positive hostility, or at least lukewarmness, to the Confederate cause. As the reconstruction proceeded, the test was insensibly transformed until, before the end was reached, the prime qualification of the loyal man was approval of the Reconstruction Acts and of negro suffrage. Office-holding thus tended to become the prerogative of those few whites who professed allegiance to the Republican Party. Only in connection with the registration and after the enfranchisement was complete were the blacks admitted to important official positions.[3]

The actual practice of the commanders in respect to removals and appointments varied in the different districts. From Virginia to Texas the construction and application of the powers

[1] Constitution, art. ii, sec. 2.

[2] *Cf.* Wilson in Cong. Globe, 1st sess., 40th Cong., p. 527.

[3] Five negroes were appointed policemen in Galveston as early as June 10, and there may have been other instances of this kind. — Ann. Cyc., 1867, p. 715.

conferred by the act grew more radical with the progress southward. General Schofield, in Virginia, besieged headquarters with supplications for authoritative rulings upon his powers, and meanwhile exercised the powers with great moderation. Civil officers were not "removed," but were "suspended" from office and "prohibited from the exercise of the functions thereof until further orders."[1] Civilian appointments were made after consultation with local judicial officers, and the appointees were duly commissioned by the governor of the state. In the Carolinas General Sickles was obliged to assert his authority more freely. He was, however, able to maintain cordial relations with Governors Worth and Orr,[2] and this fact smoothed his path somewhat. Removals were made only for positive misconduct in office, and were but twelve in number for the first three months of the command.[3] Appointments were very numerous, a large number of municipal offices falling vacant by expiration of the incumbents' terms. The extent to which the military power affected the most peaceful aspects of social life is illustrated by the fact that a "trustee of Newbern Academy" was among those who were clothed with official authority by orders from headquarters.[4] In the third district General Pope assumed at once an extreme position as to the scope of his authority, and proposed to exercise it by deposing Governor Jenkins, of Georgia, for expressing hostility to the Reconstruction Acts. The governor saved himself by a plea of ignorance as to the commander's will, and escaped with nothing worse than a severe scolding, administered in a letter which manifested the same easy self-confidence and fluency of expression that had made its author a little ridiculous in the second Bull Run campaign.[5] At the end of May the mayor, chief of police and other municipal officers of Mobile were summarily removed, and their places were filled by "efficient Union men." The occasion for this was a disturbance that took place in connection with a meeting at which Congressman Kelley, of

[1] *Cf.* Special Orders, No. 50 and No. 54, in reference to certain justices of the peace.

[2] Sickles to Grant, Sen. Ex. Doc., No. 14, 1st sess., 40th Cong., p. 56.

[3] *Ibid.*, p. 58. [4] *Ibid.*, p. 81. [5] *Ibid.*, p. 102.

Pennsylvania, made an address. This exercise of the power of removal and appointment excited very widespread attention, and controversy raged fiercely as to the justice and legality of the action. It was but a few days later that General Sheridan, at New Orleans, took the most decisive step of all in removing Governor Wells, of Louisiana, and appointing Mr. Flanders, a civilian, in his place. Removals and appointments in minor offices[1] had been very frequent in the fifth district, but this last action brought the whole question to a head. As department commander before the passage of the Reconstruction Acts, General Sheridan had conceived a very poor opinion of the leading politicians of both Louisiana and Texas, Governor Wells among them.[2] But Wells had influential friends in administration circles at Washington, where Sheridan was particularly disliked; and, moreover, the extension of the discretionary power of a commander to a sphere where very important considerations of influence and emolument were involved caused a great sensation.

President Johnson was now overwhelmed with demands that the acts of Sheridan and Pope should be overruled. Attorney-General Stanbery had been asked for an opinion on this and other points in the interpretation of the reconstruction laws. His opinion, rendered under the date of June 12, declared that these acts gave no authority whatever for either removal or appointment of executive or judicial officers of a state.[3] But Congress sprang promptly into the breach, and by the supplementary act of July 19[4] gave to the commanders, in the most unqualified terms, power to remove at their discretion any state officer, and to fill vacancies either by the detail of an officer or soldier, or "by the appointment of some other person." Under this authority there was no longer any room for doubt or ground for hesitation. The act provided further that it should be the "duty" of the commanders to remove from office all persons

[1] The attorney-general of the state and the mayor and city judge of New Orleans were removed March 27.

[2] *Cf.* Sheridan's report for 1866, in Rep. of Sec'y of War, 2d sess., 39th Cong.

[3] The opinion is in Sen. Ex. Doc. No. 14, 1st sess., 40th Cong., p. 275.

[4] Given in McPherson, History of the Reconstruction, p. 335.

"disloyal to the government of the United States," and required that new appointees should take the "iron-clad oath." [1]

Every facility was thus afforded for a complete control of the *personnel* of the civil administration by the commanding officers. When the constitutional conventions under the new registration met in the various states, strong pressure was put upon the generals and upon Congress to bring about a "clean sweep" of the existing officials, and a bill requiring such a proceeding was brought before the House of Representatives. But General Schofield and other officers declared that the adoption of this policy would render government impossible, as there were not available enough competent persons to fill the places vacated, if the iron-clad oath were required. Until reconstruction was nearly completed the commanders, therefore, were permitted to retain their discretion in the matter, and changes were made, as a rule, only for good cause.[2] Governor Throckmorton, of Texas, was removed July 30 for having made himself an "impediment to the execution of" the Reconstruction Acts, and was succeeded by a civilian named Pease.[3] Governor Jenkins, of Georgia, who had escaped the power of General Pope, fell quickly before that of General Meade, who succeeded Pope at the beginning of 1868. The governor, having refused to execute warrants on the state treasury for the payment of the expenses of the constitutional convention, was summarily deposed, and his functions were assigned to General Ruger.[4] Governor Humphreys, of Mississippi, was deposed in June, 1868, as an obstacle to reconstruction, and was succeeded by General Ames. In other states governors were removed,

[1] The stringent oath required from officers of the United States, by act of July 2, 1862. It could not be taken by any one who had given "voluntary support" to any Southern government during the rebellion.

[2] By the law of Feb. 6, 1869, the commanders were required to remove all officers who could not take the iron-clad oath. But at that time military government prevailed only in Virginia, Mississippi and Texas.

[3] The unsuccessful candidate in the election at which Throckmorton had been chosen governor.

[4] The treasury officials, sympathizing with Jenkins, concealed and spirited away the books of the treasury, whereupon the suspected persons were brought before a military commission for punishment. But General Meade's financial path was very thorny. — See his report for 1868.

but only to facilitate the transition from the military régime to the permanent system under the new constitutions. Of the lesser state officials the changes in *personnel* were naturally most extensive in the larger towns and cities. It was there that partisan zeal tended to find its most heated expression; and there also were to be found in the greatest numbers the Union men who could qualify for office under the new law. Before reconstruction was completed, therefore, the municipal administration in all the principal cities was remanned by military authority. The list in which this was wholly or partially the case includes Wilmington, Atlanta, Mobile, Vicksburg, New Orleans, Galveston and Richmond.

IV.

In respect to the relation of the district commanders to the laws of the states subjected to their authority, there was room for a difference of opinion similar to that which we have seen in respect to the *personnel* of the governments. Power to modify or set aside existing laws was not expressly bestowed upon the commanders; and the recognition of civil governments of a provisional character gave room for the implication that the legislation of these governments was to have permanent force. But a different view was acted upon by most of the generals from the beginning. Assuming that they were endowed with all the powers incident to "the military authority of the United States," and that their duty to "protect all persons in their rights of person and property" required the unlimited use of such powers, they refused to regard the state laws as of any significance save as auxiliary to the military government. Whatever validity attached to such laws was due to tacit or express approval of them by the commander. General Schofield, in giving to military commissioners the powers of county or police magistrates, directed them to be "governed in the discharge of their duties by the laws of Virginia," so far as these did not conflict with national laws "or orders issued from these headquarters."[1] General Sickles specifically pro-

[1] Gen. Orders, No. 31, May 28, 1867.

claimed in force "local laws and municipal regulations not inconsistent with the constitution and laws of the United States or the proclamations of the president, or with . . . regulations . . . prescribed in the orders of the commanding general."[1] From these illustrations the implication is clear that existing law could be superseded by the military order — that the district commander had legislative authority.

Against this interpretation of the Reconstruction Act Attorney-General Stanbery argued most earnestly in his opinion of June 12. No power whatever, he declared, was conferred on the commanders in the field of legislation. They were to protect persons and property, but the sole means for this purpose that the law gave them was the power to try offenders by military commission; save where such procedure was deemed necessary, the jurisdiction and laws of the old state organization remained intact. But the ingenuity of Mr. Stanbery was of no avail. In the supplementary act of July 19 Congress declared explicitly that the ten state governments, at the time the Reconstruction Act was passed, "were not legal state governments; and that thereafter said governments, if continued, were to be subject in all respects to the military commanders of the respective districts, and to the paramount authority of Congress." This phraseology assured to the generals the same free hand in respect to state laws as was assured in respect to state officers by other parts of the act.

So far as the criminal law was concerned, the failures of justice which had been alleged as justifying the establishment of military government were attributed to the administration rather than to the content of the law. The military commissions which were constituted with various degrees of system and permanency by the district commanders served very effectively to supplement the regular judiciary in the application of the ordinary state law. No extensive modifications of the law itself, therefore, were considered necessary. When policemen or sheriffs failed to arrest suspected or notorious offenders, the troops did the work; when district-attorneys failed to

[1] Gen. Orders, No. 1, March 21, 1867.

prosecute vigorously, or judges to hold or adequately to punish offenders, the latter were taken into military custody; when juries failed to convict, they were supplanted by the military courts. It was fully realized from the outset that, in the condition of public opinion in the South, trial by jury could not be expected to give strict justice to Union men or, in general, to the freedmen. As an alternative, however, for the general establishment of military commissions a remodeling of the jury laws was an obvious expedient. If juries could be empaneled from blacks and whites indiscriminately, the influence of the rebel sentiment would be neutralized. It seemed axiomatic, moreover, that, if the freedmen were qualified to vote, they were qualified for jury service. Accordingly, we find that the more radical commanders — Sickles, Pope and Sheridan — used their authority to decree that the blacks should be accepted as jurors. With the completion of the registration of voters, the attainment of the end sought was simple; court officers were directed to make up the jury panels from the registration lists.[1] General Schofield, in Virginia, with his usual wise conservatism, concluded that this method of solving the problem would not be satisfactory, and confined himself, therefore, to the use of military commissions.[2]

Before the completion of the registration made feasible the method finally employed, the commander in Texas had sought to attain the end by requiring jurors to take the "iron-clad oath." But this was bitterly resented by the Southerners on the ground that it practically excluded native whites from the juries.[3] Even the final method caused great friction between the courts and the commanders in Louisiana and Texas. The vast extent and sparse population of the region included in these states made the fifth district altogether the most difficult to

[1] *Cf.* Report of Secretary of War for 1867, vol. i, pp. 304 ss, 331 ss.

[2] "After full consideration I became satisfied that any rule of organization of juries, under laws which require a unanimous verdict to convict . . . must afford a very inadequate protection . . . in a society where a strong prejudice of class or caste exists." — Report of General Schofield in Report of Secretary of War, 1867, vol. i, p. 240.

[3] For the correspondence on this matter, see Sen. Ex. Doc., 1st sess., 40th Cong., No. 14, pp. 208–210.

deal with in every phase of the reconstruction process. When General Hancock, succeeding Sheridan, assumed command in November, 1867, he formally revoked the order requiring that jurors be chosen from the registered voters, and put the old state laws in operation. This action was an incident of the new commander's general policy, which, as embodied in his famous General Orders, No. 40, reversed that of his predecessor. "Crimes and offenses," he declared, "must be left to the consideration and judgment of the regular civil authorities"; and in Special Orders, No. 203, after reciting that Sheridan's order as to jurors was acting as a clog on justice, he asserted that in determining the qualifications for jurors it was best to carry out the will of the people as expressed in the last legislative act upon the subject.[1] The reluctance of General Hancock to interpose, either through military courts or through modification of the jury laws, in the ordinary administration of justice, gave great offense to the loyalists in the South and to the radicals throughout the Union, and was held to have resulted in a widespread revival of crime in the fifth district.[2]

The changes in the jury laws by military authority affected, of course, both civil and criminal law. Of like scope was the summary abrogation by General Sheridan of a Texas act of 1866 by which the judicial districts of the state were rearranged, the commander holding that the act had been passed for the purpose of legislating two Union judges out of office.[3] Of the modifications of criminal law pure and simple, conspicuous examples are found in Sickles' General Orders, No. 10, in which the carrying of deadly weapons was forbidden, the death penalty for certain cases of burglary and larceny was abolished, and the governors of North and South Carolina were endowed with the powers of reprieve and pardon.[4] This last provision was probably suggested by a case in which the military power had been effectively invoked by the civil in the interest of mercy.

[1] For the whole subject see Hancock's report in Report of Secretary of War for 1868; also Ann. Cyc., 1867, pp. 463–464.

[2] See his report for a sharp correspondence with Governor Pease, of Texas.

[3] Sen. Ex. Doc., 1st sess., 40th Cong., No. 14, pp. 218 *et seq.*

[4] *Ibid.*, p. 62.

A negro in North Carolina had been convicted of burglary and sentenced to death. The governor believed that the case called for clemency, but under the state laws he had the power only to pardon and not to commute. As a pardon was not desirable, the case was laid before the district commander, who then, by his paramount military authority, commuted the sentence to imprisonment for ten years.[1]

The operation of military government in connection with the general police power of the states is illustrated by General Sickles' prohibition of the manufacture of whiskey, on the ground that the grain was needed for food ; by his prohibition of the sale of intoxicating liquor except by inn-keepers ; by General Ord's command that illicit stills and their product be sold for the benefit of the poor, on the ground "that poverty increases where whiskey abounds"; and by General Sheridan's summary abolition of the Louisiana levee board and the assignment of its duties to commissioners of his own appointment, "in order to have the money distributed for the best interests of the overflowed districts of the state."[2]

V.

As to the administration of justice in the field of private law, interference by the district commanders was for the most part confined to action in special cases where the proceedings of the courts seemed inequitable or contrary to public policy. Under the latter head fall a variety of instances in which the circumstances of the war and of emancipation were involved.

[1] Sen. Ex. Doc., 1st sess., 40th Cong., No. 14, p. 76.

[2] The full reason assigned in the commander's order was: "To relieve the state of Louisiana from the incubus of the quarrel which now exists between his excellency the governor and the state legislature as to which political party shall have the disbursement of the four million dollars of 'levee bonds' authorized by the last legislature, and in order," *etc.*, as above. — Sen. Ex. Doc., 1st sess., 40th Cong., No. 14, p. 250. General Sheridan's orders and correspondence afford copious evidence that his temper was sorely tried by the Louisiana politicians. In several of his dispatches to General Grant his language in reference to the president's policy was perilously near the line of insubordination; but it won for him the enthusiastic support of the radicals in the North, and the House of Representatives passed a special vote of thanks to him for his services in Louisiana.

Thus we find General Schofield ordering a Virginia court to suspend proceedings for collecting a judgment in a case of assault committed in 1863.[1] General Sickles set aside a decree of the South Carolina court of chancery which ordered that a fund, raised to remount a Confederate cavalry force in 1865, but left unused in a Charleston bank, should be returned to the contributors. The general held that the money belonged to the United States.[2] Again, a Charleston savings bank was obliged by military order to pay, with interest, sums due to certain soldiers who were in the garrisons of Forts Sumter and Moultrie in 1860, and who had demanded their money, but in vain, just before the beginning of hostilities.[3] General Ord suspended proceedings looking to the sale of an estate on account of a deed of trust for money due for the purchase of negroes.[4]

Such examples of intervention by special orders are numerous; a far-reaching modification of law and procedure was attempted only by General Sickles in the second district. His General Orders, No. 10, of April 11, 1867, with the later supplementary decrees, assumed, as Attorney-General Stanbery complained, "the dimensions of a code."[5] The basis of this policy was the widespread destitution among the people and the General's conviction that extraordinary measures were necessary to enable them to develop their resources. There was no room for doubt that the Southern states were all in a condition of economic demoralization. As usual under such circumstances, the complaints of debtors, based generally on real hardship, were loud and widespread. Not in the Carolinas alone, but throughout the South, the demand for stay laws was heard. It would hardly have been surprising if all the district commanders, in the plenitude of their powers and the benevolence of their hearts, had sought to bring prompt relief by decreeing new tables. General Sickles, after describing the distress due to crop failure and debt, and the "general disposition shown by creditors to enforce upon an impoverished

[1] Sen. Ex. Doc., 1st sess., 40th Cong., No. 14, p. 47.
[2] Ann. Cyc. for 1867, art. "South Carolina."
[3] Sen. Ex. Doc., 1st sess., 40th Cong., No. 14, p. 86.
[4] *Ibid.*, p. 152. [5] Opinion of June 12, *ibid.*, p. 281.

people the immediate collection of all claims," declared that "to suffer all this to go on without restraint or remedy is to sacrifice the general good." Accordingly, he announced the following regulations, among others, to remain in force until the reconstructed governments should be established: Imprisonment for debt was prohibited. The institution or continuance of suits, or the execution of judgments, for the payment of money on causes of action arising between December 19,[1] 1860, and May 15, 1865, was forbidden. The sale of property upon execution for liabilities contracted before December 19, 1860, or by foreclosure of mortgage was suspended for one year. Advances of capital, required "for the purpose of aiding the agricultural pursuits of the people," were assured of protection by the most efficient remedies contained in existing law; and wages of agricultural labor were made a lien on the crop. A homestead exemption, not to be waived, was established for any defendant having a family dependent upon his labor. The currency of the United States was ordered to be recognized as legal tender. Property of an absent debtor was exempted from attachment by the usual process; and the demand for bail in suits brought to recover ordinary debts, "known as actions *ex contractu*," was forbidden.

These sweeping enactments were followed by others of a similar character. Having prohibited the manufacture and regulated the sale of whiskey within the district, General Sickles further decreed that no action should be entertained in any court for the enforcement of contracts made for the manufacture, sale, transportation, storage or insurance of intoxicating liquors. Having prohibited discrimination in public conveyances between citizens "because of color or caste," he gave to any one injured by such discrimination a right of action for damages. Finally, he abolished distress for rent, and ordered that the crops should be subject to a first lien for labor and a second lien for rent of the land.[2]

[1] South Carolina passed its ordinance of secession December 20, 1860.

[2] Gen. Orders, No. 32, May 30, 1867; Sen. Ex. Doc., 1st sess., 40th Cong., No. 14, p. 71.

This interpretation of military authority as the basis of a benevolent despotism called forth a vigorous protest from Attorney-General Stanbery in his opinion of June 12. But nothing was done to interfere with the commander's proceedings until he came in rude conflict with the national judiciary. On the theory on which his decrees were based they were valid against any authority save Congress. Chief Justice Chase sat in the circuit court at Raleigh in June, 1867, and proceeded in due course to decide cases and issue process of execution to enforce judgments. A marshal who undertook to execute in Wilmington a judgment that fell within the stay decrees of General Orders, No. 10, was prevented by the commander of the post, who was sustained by General Sickles. This action raised an issue of a much more serious character than was involved in the interference with merely state judicial procedure. Chief Justice Chase protested to the president that the military authority established to enforce the laws of the United States was being employed to obstruct them. Steps were taken by the federal district attorney in North Carolina to proceed against Sickles for resisting judicial process of the federal courts. General Grant wrote to Sickles that "the authority conferred on district commanders does not extend in any respect over the acts of courts of the United States." Still Sickles asked for time to explain; but before his explanation was completed, the president performed the executive duty which Mr. Stanbery had in June assured him could not safely be avoided or delayed;[1] for on August 26 General Sickles was, by order of the president, relieved of his command. His successor, General Canby, promptly instructed the commander at Wilmington not to oppose the execution of the circuit court's judgment. Thus it was settled that, though a debtor was protected against a creditor who was a citizen of the same state, a foreign creditor was assured of the customary relief. This situation was only another example of the anomalies that characterized the whole process of reconstruction. To any protest against the injustice of such a condition the ready re-

[1] Opinion of June 12.

sponse was: Hasten the work of reconstruction, secure the admission of the states to full rights, and all irregularities will cease.

In other districts than the second the apparent necessity of relieving distress produced a few instances of paternal modification of private law. In June, 1867, General Ord, "with a view to secure to labor . . . its hire or just share of the crops, as well as to protect the interests alike of debtors and creditors from sacrifices of property by forced sales," suspended till the end of the year the judgment sale of lands under cultivation, crops or agricultural implements, on actions arising before January 1, 1866.[1] But this decree was explicitly declared to be not applicable so far as the United States courts were concerned. In Virginia, also, sales of property under deeds of trust were suspended where the result would be to sacrifice the property or to leave families or infirm persons destitute of support.[2] Radical action on behalf of debtors was strongly favored by many in the South; and this sentiment found expression in the constitutional conventions when they assembled in the various states. In Mississippi the convention petitioned General Gillem, Ord's successor, to stay executions for debt by military order; but the general refused.[3] Hancock, in the fifth district, when asked if he would enforce an ordinance of a convention for the relief of debtors, replied that he regarded such an ordinance as beyond the scope of the convention's authority.[4] Pope, in the third district, referring to suggestions that had been made publicly, said: "I know of no conceivable circumstance that would induce me to interfere by military orders . . . with the relation of debtor and creditor under state laws."[5] The conventions in Georgia and Alabama, however, adopted ordinances prohibiting various proceedings "oppressive" to debtors and abolishing certain debts, to take effect with the new constitution. General Meade, who had succeeded Pope, became aware that great hardships were being

[1] Gen. Orders, No. 12, Sen. Ex. Doc., 1st. sess., 40th Cong., No. 14, p. 146.
[2] Ann. Cyc., 1868, p. 760. [3] *Ibid.*, p. 508.
[4] Report annexed to Report of Secretary of War, 1868-69, vol. i, p. 249.
[5] Ann. Cyc., 1867, p. 365.

caused by the eagerness of creditors to press for executions, in order to anticipate the operation of the ordinances. As the only method of meeting this difficulty, he proclaimed the ordinances in force at once as a military order.[1] Thus Georgia and Alabama were for a time on the same plane with the Carolinas in this particular matter.

VI.

In the administration of state finances the same arbitrary authority was exercised as in the matters already considered. By the act of March 23 Congress provided for the payment out of the treasury of the United States of "all expenses incurred by the several commanding generals, or by virtue of any orders issued or appointments made by them under or by virtue of this act." But the "fees, salary and compensation to be paid to all delegates and other officers . . . not herein otherwise provided for" were to be prescribed by the respective conventions, which were authorized by the act to levy and collect taxes for the purpose. A method of interpretation no more liberal than that which was applied by Congress to other provisions of the act would have availed, if applied to these, to throw the entire burden of state administration on the national treasury.[2] In practice, however, the Congressional appropriations were employed only for the expenses of the registration and of the elections, both for delegates to the conventions and for ratification of the constitutions. The running expenses of the state governments were paid from the respective state treasuries. The condition of the finances in most of the states was anything but reassuring; and the feeling of the property owners toward reconstruction did not conduce to more than usual promptness in the payment of taxes. Considerable friction developed also in adapting the administrative machinery of assessment, collec-

[1] Report annexed to Report of Secretary of War, 1868.

[2] President Johnson, employing this method, rolled up an appalling total ($16,000,000 certainly, and "hundreds of millions" probably) as his estimate of the sum necessary to carry out the Reconstruction Acts. — Message of July 15, 1867.

tion and disbursement of moneys to the requirements of military rule. Most of the difficulties were removed through the generals' control over the *personnel* of the administration. Their legislative authority became necessary, however, in a number of cases through expiration of the laws regulating tax levies and appropriations. The assembling of the legislatures was, of course, forbidden; and the prolongation of the laws beyond the term fixed by their provisions was effected by orders from headquarters.[1] At the same time advantage was taken of the opportunity to effect such changes in taxation and expenditure as seemed desirable under the changed circumstances. General Pope directed that no payments should be made from the state treasuries of his district, except on his approval, in order that he might prevent further expenditures for "bounties to soldiers in the rebel army for support to their families; pay of civil officers under the confederacy; providing wooden legs, *etc.*, for rebel soldiers; educating rebel soldiers, *etc.*," few of which he thought likely to be authorized by the reconstructed state governments.[2] In South Carolina General Canby suspended the collection of a tax on sales which had been imposed by the last legislature, and had given rise to complaints because of its retroactive effect;[3] and in December decreed material reductions in several kinds of taxes.

When the conventions met in the various states, the military authority was required to settle various questions connected with their financial operations. As we have seen, the conventions were authorized by law to levy and collect taxes on property for the payment of the delegates and for other expenses. One of the first acts in each convention was to fix the salary of delegates — at a figure generally that aroused much enthusiasm among the negro members. But to await the levy and collection of a tax before enjoying the emolument of office was a possibility that seriously damped the ardor of the constitution-makers: in fact, in view of the poverty of the people in

[1] *E.g.*, Hancock's Special Orders, No. 40, of February 22, 1868. — Report of Secretary of War, p. 232.

[2] Pope's report, annexed to Report of Secretary of War for 1867.

[3] Ann. Cyc. for 1867, p. 699.

general and the antagonism of the whole tax-paying class to the convention, such delay threatened the further process of reconstruction with failure. Hence recourse was had at once to the expedient of an advance from the state treasury for immediate expenses, on the security of the tax that was levied by the convention. Such advance was ordered by the commanders,[1] as no authority of state law for this appropriation of funds could be found. But the power of the commanders was called upon to restrain as well as to promote the activity of the conventions. There was a marked tendency on the part of these bodies to arrogate to themselves governmental as well as constituent functions, and to exceed the limits of the task prescribed by the terms of the Reconstruction Acts. This tendency the commanders firmly repressed. In Mississippi, among other manifestations of this spirit, the ordinance for the levy and collection of the tax to cover the convention's expenses was cast in a form that General Gillem refused to approve. His refusal to enforce it caused the convention to repeal it and to pass another that was satisfactory to him.[2] This episode illustrates the fact that, in the plenitude of their powers as absolute rulers, the generals were above the constituent assemblies of the inchoate new states as distinctly as they were above the governmental organs of the expiring old states.

The foregoing review reveals how far-reaching was the authority of the military commanders in the practical operations of state government. It would be hard to deny that, so far as the ordinary civil administration was concerned, the rule of the generals was as just and efficient as it was far-reaching. Criticism and denunciation of their acts were bitter and continuous; but no very profound research is necessary in order to discover that the animus of these attacks was chiefly

[1] It was for refusing to issue the warrants in conformity to this order that the governor and financial officers of Georgia were removed by General Meade. — *Ante*, p. 393.

[2] Report in Report of Secretary of War, 1868, pp. 585 *et seq.* One clause of this latter ordinance, which imposed a tax on railroads, contrary to an exemption in their charters, was annulled by General Gillem.

political. The instincts and traditions of popular government would permit no recognition of excellence in any feature of arbitrary one-man rule ; and the whole system was, moreover, in the eyes of the critics, hopelessly corrupted by the main end of its establishment — negro enfranchisement. The influence of this end was, in truth, so prominent that a judgment on the merits of the administration of the generals apart from it is almost impracticable. In their conduct of civil affairs equity and sound judgment are sufficiently discernible to afford a basis for the view that military government, pure and simple, unaccompanied by the measures for the institution of negro suffrage, might have proved for a time a useful aid to social readjustment in the South, as preliminary to the final solution of the political problems. But the opportunity for the most profitable employment of such government had passed when, through President Johnson's policy, civil functions had been definitely assumed by representative organizations in the states. There would, indeed, have been substantial merit in the consistent application of either the presidential or the congressional policy in reconstruction; but there was disaster alone in the application of first the one and then the other.

WM. A. DUNNING.